Supreme Court, U.S.
FILED
OCT 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

October Term, 1980

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

O'DONNELL & SCHWARTZ
Attorneys for Respondent Transport Workers Union of America, AFL-CIO
285 Madison Avenue
New York, N.Y. 10017
212-532-8900

Of Counsel:

ASHER W. SCHWARTZ

Question Presented

1. Whether an employer which, in the exercise of its own discretion, employed males only in a purser position and females in a cabin attendant position, and which has been adjudged for that reason to have discriminated against the female cabin attendants because of their sex in violation of Title VII of the Civil Rights Act, and which has also been adjudged to have violated the Equal Pay Act and Title VII by paying lower salaries to the female cabin attendants than it paid to the male pursers for equal work performed under similar working conditions, may thereafter claim contribution from the labor union representing such pursers and cabin attendants toward the payment of such judgment on the ground that the union is a party to a labor agreement which included such differential in pay.

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Authorities v

Statement 1

A. The Salaries of Stewardesses and Pursers Were Fixed by NWA Before They Were Treated in Collective Bargaining Agreements 2

B. ALSSA, Transport Workers Union of America, AFL-CIO ("TWU"), Continued Its Bargaining Where ALSSA Left Off in 1961 3

C. TWU Sought to Make the Purser Position Available to Stewardesses Since 1963 by Collective Bargaining, But Was Unable to Do So Because of the Persistent Opposition of NWA 3

D. The U.S. District Court Found That NWA Violated the Equal Pay Act and Title VII of the Civil Rights Act, Not That the Collective Bargaining Agreements Violated the Acts 5

E. The Stewardesses' Bargaining Representatives Had Accepted the Company's Position That the Purser Position Performed Extra Duties of a Supervisory Nature Warranting a Higher Rate of Pay, But Opposed NWA's Insistence That the Purser Position Be Restricted to Men 5

Summary of Argument 6

PAGE

ARGUMENT—

I. NWA's Allegation That, By Virtue of Their Participation in the Negotiation, Execution and Implementation of Collective Bargaining Contracts With NWA Which Provided That NWA Pay Higher Salaries to Male Pursers Than to Female Cabin Attendants for Equal Work, TWU and ALPA are Liable, as Is NWA, for Violation of the Equal Pay Act and Title VII of the Civil Rights Act, Does Not State a Claim Against TWU and ALPA of Liability to NWA for Any Portion of NWA's Liability for Its Violation of the Acts 10

A. TWU and ALPA Did Not Cause or Attempt to Cause NWA to Violate the Equal Pay Act or Title VII 10

B. The Averment That TWU and ALPA Participated in the Negotiation of a Labor Agreement With NWA Which Includes a Provision That Grants Higher Salaries to Male Pursers Than to Female Cabin Attendants (J.A. 18, ¶ 7) Is Not Sufficient to Support a Claim That TWU or ALPA Violated the EPA, 29 USC §206(d)(2) or Title VII, 42 USC §2000e-2(c) 13

II. If a Duty of Contribution by a Union to an Employer in a Title VII or Equal Pay Act Proceeding Is Recognized by This Court Under Any Circumstances It Can Be Only Upon Equitable Grounds of Which There Are None That Favor NWA in This Proceeding 23

PAGE

A. NWA Alone Profited From Its Failure to Pay Stewardesses Rates of Pay Equal to Those Paid to Pursers 23

B. NWA Alone Violated the Civil Rights Act by Refusing Employment to Women in the Purser Position 25

C. NWA Refused to Open the Purser Position to Women or to Remove the Differential Lawfully 26

D. NWA's Claim for Contribution Is Not Addressed to Any Union Beneficiary of NWA's Violation of Either the EPA or Title VII 28

CONCLUSION 31

APPENDIX A—

Unpublished Judgment of Cir. Ct., D.C., in Appeal No. 79-1782 ..... 1a

APPENDIX B—

EEOC Decision 70-112, Case No. YAT 9-197, CCH, EEOC Decision 1973, ¶ 6108, P. 4159 ..... 5a

Table of Authorities

Cases: PAGE

Airline Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, et al. v. *American Airlines,* (7th Cir. 1973) 490 F. 2d 636 ..... 17, 21

Airlines Stewards, etc., Local 550 v. *American Air-Lines, Inc.* (7th Cir. 1972) 455 F.2d 101 16

Albemarle Paper Co. v. *Moody,* (1975) 422 U.S. 405 21

Alexander v. *Gardner-Denver Co.,* (1974) 415 U.S. 36 ..... 16, 18

Allied Chemical & Alkali Workers of America v. *Pittsburgh Plate Glass Co.,* (1971) 404 U.S. 157 27

Burwell et al. v. *Eastern Airlines* (E.D. Va. 1978), 458 F. Supp. 474 20

Emporium Capwell Co. v. *Community Org.,* (1974) 420 U.S. 50 15

Ford Motor Co. v. *Huffman,* 345 U.S. 330 (1953) 18

Green v. *U.S. Steel Corp.,* (D.C.E.D. Pa. 1979), 481 F. Supp. 295 ..... 13, 27

Hairston v. *McLean Trucking Co.* (4th Cir. 1975), 520 F. 2d 226 21

Humphrey v. *Moore,* (1964) 375 U.S. 325 18

Johnson v. *Ryder Truck Lines, Inc.* (4th Cir. 1977), 555 F. 2d 1181 22

Laffey et al. v. *Northwest Airlines,* (D.D.C. 1973) 366 F. Supp. 763 and (D.D.C. 1974) 374 F. Supp. 1382 affirmed in part, vacated in part, (D.C. Cir. 1976), 567 F. 2d 429 *cert. denied,* (1978) 434 U.S. 1086 ....*passim*

PAGE

Lewis v. *United States,* —— U.S. ——, 63 L. Ed. 2d 198 (1980); 48 Law Week 4205 (1980) 10
Local 194, Retail, Wholesale and Department Store Union v. *Standard Brands, Inc.* (7th Cir. 1976), 540 F. 2d 864 21

Macklin v. *Spector Frieght Systems, Inc.* (D.C. Cir. 1973), 478 F. 2d 979 ..... 22n, 30n
Murphy v. *Miller Brewing Co.* (E.D. Wis. 1969) 307 F. Supp. 829, *aff'd* (7th Cir. 1972) 457 F. 2d 221 ..... 13, 19
Myers v. *Gilman Paper Corp.,* (5th Cir. 1977) 544 F. 2d 837 ..... 15, 19

Ray Marshall, Secretary of Labor v. *U.S. Postal Service, et al.* (D.D.C. 1978) 481 F. Supp. 179, aff'd in part, reversed in part, by unpublished judgment of Cir. Ct., D.C., in Appeal No. 79-1783 (Copy annexed as Appendix A) 17
Reiter v. *Sonotone Corp.,* (1979) 442 U.S. 330 10
Russell v. *American Tobacco Co.* (4th Cir. 1975), 528 F. 2d 357 21

Steele v. *Louisville & Nashville R.R. Co.,* (1944) 323 U.S. 192 ..... 17, 18

United Steelworkers of America v. *Warrior and Gulf Navigation Company,* (1960) 363 U.S. 574 14

Vaca v. *Sipes,* (1967) 386 U.S. 171 18

Westvaco Corp. v. *Adams Extract Co.,* No. 79-972 ..... 2, 23, 31
Williams v. *Norfolk and Western Railway Co.* (4th Cir. 1975), 530 F. 2d 539 22

Statutes: PAGE

Equal Pay Act of 1963—
29 U.S.C. § 206, et seq. ..... *passim*
29 U.S.C. § 206(d)(1) ..... *passim*
29 U.S.C. § 206(d)(2) 10, 11
29 U.S.C. § 255(a) 12

Fair Labor Standards Act—
29 U.S.C. § 201, et seq. 16

Federal Employers' Liability Act—
42 U.S.C. § 51, et seq. 16

Railway Labor Act—
45 U.S.C. § 152 ..... 14, 15
45 U.S.C. § 156 14

Title VII of Civil Rights Act of 1964—
42 U.S.C. § 2000e-2(a) 12
42 U.S.C. § 2000e, et seq. ..... *passim*
42 U.S.C. § 2000e-2(c) 10, 11

Other Authorities:

EEOC Decision 79-112, Case No. YAT 9-197, CCH EEOC Decision 1973 ¶6108, p. 4159 (Copy annexed as Appendix B) 19

Labor-Mangement Relations Act 31

Labor-Management Reporting and Disclosure Act of 1959 31

Labor Law Journal 394-5 (July 1980) 19

The Occupational Safety and Health Act (OSHA) 29 U.S.C. § 661, et seq. 16

IN THE

Supreme Court of the United States

October Term, 1980

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

Statement

The obligation of a union at common law to contribute to the payment to its members of damages which were awarded against their employer for violation of the Equal Pay Act, 29 U.S.C. §206 et seq. ("EPA") and Title VII of the Civil Rights Act, 42 U.S.C. §2000e et seq. ("Title VII") is fully treated by our brethren representing the Air Line Pilots Association ("ALPA"). This brief will treat NWA's right to contribution from the Respondents.

This Court granted Northwest Airlines ("NWA") its petition for certiorari in this proceeding in tandem with

Westvaco Corp. v. *Adams Extract Co.*, No. 79-972, an anti-trust case. This brief will direct itself to showing that whatever may be the reason, if any, for supporting contribution in an anti-trust matter such as *Westvaco,* NWA has no claim for contribution from the respondent unions toward the payment of damages to employees they represent who have been denied fair wages on account of their sex. In doing so, the brief will refer to the Findings of Fact and Conclusions of Law in *Laffey et al.* v. *Northwest Airlines,* (D.D.C. 1973) 366 F. Supp. 763 and (D.D.C. 1974) 374 F. Supp. 1382 affirmed in part, vacated in part, (D.C. Cir. 1976) 567 F. 2d 429, cert. denied (1978) 434 U.S. 1086 as does the brief of NWA to this Court, dated August 1980, even though, unlike NWA, the Transport Workers Union ("TWU") was not heard in that proceeding.

A. *The Salaries of Stewardesses and Pursers Were Fixed by NWA Before They Were Treated in Collective Bargaining Agreements.*

Stewardesses were employed by NWA since at least 1927, 366 F. Supp., at 765 (¶6). They were first included in a collective bargaining agreement with the Air Line Stewards and Stewardesses Association, International ("ALSSA") on September 19, 1947, 366 F. Supp., at 766 (¶10). Pursers, all male, were first employed in 1947, but were not included in a collective bargaining agreement until January 1, 1949, 366 F. Supp., at 766 (¶11). That agreement maintained a differential established by NWA in 1947 and the agreements which followed continued the differential, as adjusted by equal or substantially equal percentage wage increases negotiated for pursers and cabin attendants. Pursers' salaries are, and always have been, approximately 30 to 55 percent higher than those of stewardesses of equal longevity engaged in domestic flying, and approximately 20 to 35 percent higher than steward-

esses of equal longevity engaged solely in foreign flying, 366 F. Supp., at 788 (¶80).

B. *ALSSA, Transport Workers Union of America, AFL-CIO ("TWU"), Continued Its Bargaining Where ALSSA Left Off in 1961.*

The respondent TWU began its representation of NWA pursers and stewardesses on July 7, 1961, when ALSSA became affiliated with TWU. It was then certified by the National Mediation Board as "Air Line Stewards and Stewardesses Association, International, Transport Workers Union of America, AFL-CIO" ("ALSSA, TWU"). ALSSA, TWU, in turn, was replaced by respondent Air Line Pilots Association, International, AFL-CIO ("ALPA"), on September 17, 1971, 366 F. Supp., at 765 (¶7).

Mary P. Laffey and others commenced an action against NWA in the United States District Court on July 15, 1970, alleging salary discrimination against them because of their sex. TWU was not charged in any Labor Department or EEOC proceeding and was not named as a defendant nor served with a cross-claim or joined as a party defendant in the District Court. On November 12, 1973, the District Court made specific findings of fact and conclusions of law, which appear in *Laffey et al.* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763, *supra,* and which will be referred to herein as they relate to the argument on the issues in this proceeding. Judgment was entered against NWA on April 3, 1974, 374 F. Supp., at 1382.

C. *TWU Sought to Make the Purser Position Available to Stewardesses Since 1963 by Collective Bargaining, But Was Unable to Do So Because of the Persistent Opposition of NWA.*

NWA employed men only for the purser position from the very beginning of the establishment of that position

without any union agreement to such a restriction, 366 F. Supp. at 772 (¶ 37). The definition of a purser in the agreements signed by NWA and ALSSA made no reference to the gender of the purser, 366 F. Supp. at 766 (¶ 11).

ALSSA, TWU, began its effort to open the purser position to women in 1963 and 1964, when it proposed that stewardesses progress to purser vacancies in seniority order after the last flight service attendant who desired to become a purser had done so. The Company refused to agree to this proposal and it was not included in the agreement, 366 F. Supp. at 767 (¶ 22). In 1966 and 1967, one of NWA's opening proposals was that a single "cabin attendant" classification be established and that the rate of pay for this single classification be the lower stewardess rate of pay. The Union opposed this proposal and it was not adopted. The proposal violated the Equal Pay Act, 29 U.S.C. § 206(d)(1), by equalizing pay at the lower rate instead of the higher rate. TWU then proposed that stewardesses be permitted to advance to the position of purser in seniority order. The Company refused to accept TWU's proposal, but stated that it would agree to a provision permitting stewardesses to bid for purser vacancies if the Company was allowed a "right of selectivity." TWU agreed, on June 15, 1967, because it was convinced that it was the most it could achieve. 366 F. Supp., at 767-768 (¶ 23).

Employing its "right of selectivity", the Company thereafter avoided the employment of stewardesses and other females as pursers, despite the agreement of June 15, 1967, 366 F. Supp., at 768-773 (¶¶ 24-38). Mary Laffey alone became a purser in June 1968, and was able to serve as such until December 1970, when she was reduced to stewardess. 366 F. Supp., at 770-771 (¶¶ 31-35).

In the negotiations of 1969 and 1970, TWU proposed that stewardesses be allowed to progress to purser vacancies in

seniority order; that stewardesses who became pursers be credited with their full cabin attendant seniority; and that stewardesses who became pursers be slotted into the purser pay scale on the basis of their total cabin attendant seniority. The Company refused to agree to any of TWU's proposals. Its chief negotiator stated that the Company "prefers males and intends to have them", in the purser position. 366 F. Supp., at 778 (¶ 45). In each round of collective bargaining negotiations since at least the mid-1950's, the union proposed that stewardesses serving as Senior Cabin Attendant, receive a supplement to their pay. In each instance, the Company refused, 366 F. Supp., at 786 (¶ 70). In each instance, rates of pay for pursers and cabin attendants were raised in equal measure on a percentage basis, 366 F. Supp., at 788 (¶ 80) as is the practice generally followed in the airline industry.

D. ***The U.S. District Court Found That NWA Violated the Equal Pay Act and Title VII of the Civil Rights Act, Not That the Collective Bargainnig Agreements Violated the Acts.***

The U.S. District Court concluded, on November 22, 1973, that NWA discriminated on the basis of sex in violation of Title VII by excluding females from the purser position and violated the EPA and Title VII by paying female cabin attendants lower salaries than it paid to male pursers for equal work performed under similar working conditions. 366 F. Supp., at 789-790 (¶¶ 2, 4 and 5(a)).

E. ***The Stewardesses' Bargaining Representatives Had Accepted the Company's Position That the Purser Position Performed Extra Duties of a Supervisory Nature Warranting a Higher Rate of Pay, But Opposed NWA's Insistence That the Purser Position Be Restricted to Men.***

The Union's efforts to open the purser position to women has been described above. The U.S. District Court ordered

the entry of judgment on April 3, 1974, 374 F. Supp., 1382. In its Supplemental Memorandum, on page 1390, the Court stated that,

> "While this Court has found in fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point."

Summary of Argument

A. The essence of the discrimination in this matter which is proscribed by the EPA and Title VII is not the differential in pay between the purser position and the cabin attendant position. It was a traditional practice of the Company and in the airline industry to maintain such a differential between those two positions. If women, as well as men, had been employed by NWA in the purser position, and men as well as women had been employed in the cabin attendant position, as required by Title VII, the differential in pay would not have been discriminatory on account of sex, and therefore not in violation of law. It is the exclusion of women from the purser position because of their sex that caused the differential in pay to be a violation of the Acts. NWA alone was responsible for such exclusions.

1. TWU opposed the exclusion of women from the purser position. NWA originated the practice. It

also followed a policy of employing females only in the cabin attendant position.

2. An employer's hiring and qualifications for hiring are a responsibility and prerogative of management and are not a mandatory bargaining issue. The employer alone is accountable for formulating and implementing its hiring policy.

B. TWU did not discriminate against a minority of its members. Its policy and practice on NWA was determined by the victimized female cabin attendants who outnumbered the male purser membership by more than 15 to 1 in an autonomous unit within TWU. They elected the negotiators who were responsible for the negotiation of their labor agreement, they proposed and ratified such agreements, and otherwise dominated the policies and practices of the union and those who were responsible for implementing them.

C. In maintaining across the board percentage increases in collective bargaining for all its members, including pursers and cabin attendants, TWU was conforming to sound union principles, to industrial practice in the airline industry, and to the will of its overwhelmingly female membership.

D. TWU did not "cause or attempt to cause" NWA to discriminate on the basis of sex. On the contrary, it resisted NWA's policy and practice of segregating males and females in its aircraft cabins as best it could through collective bargaining.

1. The acquiescence of TWU in the collective bargaining agreement and its participation in the negotiation of that agreement are not proof that *it* caused the employer to act as stated in the agreement.

Unlike agreements between parties whose bargaining relationship is a voluntary one, a Union is required by law to make and maintain agreements and to do so only with the employer whose employees it represents. Many items are included in a labor agreement as they are demanded by the employer. The Union's demand for equal treatment in wage rate improvements for pursers and cabin attendants in equal measure meant a continued discriminatory differential in pay between males and females after 1964 only because NWA insisted on hiring and assigning employees to the purser and cabin attendant positions on the basis of sex. NWA's proposal in 1966 and 1967 that cabin attendant salaries be paid to pursers and stewardesses at the lower stewardess rate was a proposed violation of the EPA, 29 U.S.C. §206 (d)(1).

E. The allegations in NWA's complaint that TWU and ALPA participated in the negotiation, execution and implementation of the agreement containing the differential between purser and cabin attendant rates of pay are thus not sufficient to state a claim that TWU and ALPA "caused or attempted to cause" NWA to pay lower salaries to female cabin attendants than it paid to pursers because of their sex.

F. If contribution by a labor union to an employer may be appropriate in a Title VII or EPA case, it is as an equitable remedy and, being such, NWA is not entitled to any contribution by TWU toward the payment of the Laffey judgment against the Company.

1. TWU and ALPA and their memberships gained nothing by the failure of NWA to pay to its nu-

merous stewardesses the higher salary that it paid to its few pursers.

2. The services performed by the stewardesses employed by NWA for which the higher purser salaries were owing to them were performed for the benefit of NWA, not TWU or ALPA.

3. The money NWA saved by paying stewardesses less in salary than it paid to pursers added to NWA's profits for many years, and added nothing to TWU's or ALPA's treasuries or to the income of their members from whom contribution is sought.

4. NWA's refusal to employ females in the purser position because of their sex was a violation by NWA of Title VII in which TWU and ALPA did not participate in any way. TWU urged, as early as the 1963 negotiations and thereafter, that the purser position be available to women, as well as to men.

ARGUMENT

I.

NWA's Allegation That, By Virtue of Their Participation in the Negotiation, Execution and Implementation of Collective Bargaining Contracts With NWA Which Provided That NWA Pay Higher Salaries to Male Pursers Than to Female Cabin Attendants for Equal Work, TWU and ALPA are Liable, as Is NWA, for Violation of the Equal Pay Act and Title VII of the Civil Rights Act, Does Not State a Claim Against TWU and ALPA of Liability to NWA for Any Portion of NWA's Liability for Its Violation of the Acts.

A. *TWU and ALPA Did Not Cause or Attempt to Cause NWA to Violate the Equal Pay Act or Title VII.*

> "The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)."
>
> *Lewis* v. *United States*, —— U.S. ——, 63 L. Ed. 2d 198, at 206 (1980); 48 Law Week 4205 at 4207.

The EPA is plain and unambiguous as to the duty it imposes on labor organizations.

> "(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section *shall cause or attempt to cause such an employer* to discriminate against an employee in violation of paragraph (1) of this subsection . . ." (Emphasis supplied).
>
> 29 USC §206 (d) (2)

Title VII is equally plain and unambiguous.

> "(c) It shall be an unlawful employment practice for a labor organization—
>
> (3) *to cause or attempt to cause* an employer to discriminate against an individual in violation of this Section." (Emphasis supplied).
>
> 42 USC §2000e-2 (c)

"Cause" is what is done to bring about or effect a result. The invidious result which made NWA liable to its female cabin attendants under EPA and Title VII was not the differential in pay, but the payment of higher rates of pay to Pursers than to the Cabin Attendants *on the basis of sex.* NWA's brief acknowledges that "the EPA is addressed specifically to wage discrimination 'on the basis of sex.' 29 USC §206 (d) (1)." NWA brief, p. 21. The payment of higher salaries to some employees than to others even for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, is not invidious or a violation of law unless it is for a reason proscribed by law. In this case the only proscribed reason for paying the differential is that it is founded upon the difference in the sex of the employees. NWA does not allege that the union included the differential in their agreements with NWA on the basis of sex. For reasons which will be discussed later in this brief it could not do so truthfully. To make its complaint appear to state that the unions caused the differential to be paid on the basis of sex, it alleges that, "On May 20, 1974, after Trial, said Court entered its Judgment which, among other things, found that, at all times since 1964 and 1965, respectively, the collective bargaining contracts between NWA, TWU and ALPA, as hereinbefore alleged, has violated EPA and Title VII by

providing for the payment of lower salaries for female Cabin Attendants than for male Pursers . . ." (J.A., p. 18, ¶17). The judgment of the Court made no such finding. It found:

> "2. Northwest Airlines, Inc., has discriminated on the basis of sex in willful violation of the Equal Pay Act, 29 USC §206 (d) (1), 29 USC §255 (a), on jobs the performance of which require equal skill, effort and responsibility and which are performed under similar working conditions by:
>
> a) paying female stewardesses lower salaries and pensions than male pursers.
>
> * * *
>
> 4. Northwest Airlines, Inc. has violated Title VII of the Civil Rights Act of 1964, 42 USC §2000e-2 (a), (hereinafter "Title VII"), by paying female stewardesses lower salaries and pensions than male pursers for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.
>
> 5. Northwest Airlines, Inc. has violated Title VII:
>
> a) by discriminating against females because of their sex in filling purser vacancies from July 2, 1965 to date."
>
> *Laffey* v. *Northwest Airlines, Inc.* (D.D.C. 1973) 366 F. Supp. 763, at 789.

NWA is attempting to assert a union liability for NWA's unlawful conduct by transposing the Court's Finding in *Laffey* from a Finding that *NWA* violated the Acts into a Finding that *the labor agreements* violated the Acts and

thus the unions violated the Acts because they participated in the negotiation, execution and implementation of the agreements. To repeat, this was not the Finding of the Court and, unlike the Finding, projects a rationale which ignores the plain language of the statutes, viz., that the unions' duty was to refrain from causing NWA to pay a higher rate of pay to Pursers than to Cabin Attendants *on the basis of sex.* It did not have a duty to refrain from causing NWA to pay a higher rate of pay to Pursers than to Cabin Attendants. It was also not a duty of the union not to enter into a labor agreement covering the entire gamut of rates of pay, rules and working conditions because one of its impacts was to provide higher rates of pay for a purser position which was occupied only by males than it provided for a cabin attendant position which was occupied by females when NWA refused to permit females to serve in the higher paid position over the opposition of the union.

B. *The Averment That TWU and ALPA Participated in the Negotiation of a Labor Agreement With NWA Which Includes a Provision That Grants Higher Salaries to Male Pursers Than to Female Cabin Attendants (J.A. 18, ¶ 7) Is Not Sufficient to Support a Claim That TWU or ALPA Violated the EPA, 29 USC §206 (d) (2) or Title VII, 42 USC §2000e-2 (c).*

The Courts recognize that there is a distinction to be made between union liability for its conduct and for purely employer conduct when the union is a party to an agreement which includes a provision with an unlawful impact. *Murphy* v. *Miller Brewing Co.,* (E.D. Wis. 1919) 307 F. Supp. 829 aff'd (7th Cir. 1972) 457 F. 2d 221. *Green* v. *U.S. Steel Corp.* (D.C.E.D. Pa. 1979) 481 F. Supp. 295.

> "When most parties enter into a contractual relationship they do so voluntarily, in the sense that there is no

> real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations."
>
> *United Steelworkers of America* v. *Warrior and Gulf Navigation Company,* (1960) 363 U.S. 574 at 580.

In the absence of an agreement in collective bargaining under the Railway Labor Act, the terms of employment are fixed by the employer, or are continued as they exist in the agreement being renegotiated, Railway Labor Act, 45 USC §§152, 156. There is an economic coercion upon the employees for their union to reach an agreement. The labor agreement covers many subjects and either party may agree to one proposal simply to obtain another. In the absence of any facts as to the role of a union in the negotiation of an offending provision, its participation in the negotiation of the agreement merely shows its acquiescence to all its terms, but shows nothing as to its responsibility for the offending provision.[1] A failure to bargain away existing employer misconduct does not "cause" this misconduct. One does not cause an existing result by failing to undo it, particularly when one tries.

Must employees work without an agreement because their employer will not sign an agreement without altering

---

[1] The addition of the words, "execution and implementation" to "negotiation," in NWA's complaint (J.A., p. 18 ¶7), adds nothing of substance to its allegation, since "execution" of the agreement is implicit in the fact of "negotiation" and the only possible "implementation" of the wage clause in a labor agreement is the payment of the wages as agreed upon, which was solely a function for NWA to perform, unless its claim for contribution from the unions, in this case, is sustained.

a strict company policy the result of which is that an innocent and essential provision of the agreement becomes unlawful because of the discriminating impact of the company policy? In this case, must the Pursers and Cabin Attendants have worked without a labor agreement whose terms of compensation, including the differential, may have been acceptable to them but which resulted in an illegal impact because NWA insisted on employing men only in the higher paid position and women only in the lower paid position? While NWA's offense in this connection is not stated in the complaint, it is the Finding of the Court upon which NWA allegedly rests its claim for contribution. *Laffey, supra,* 366 F. Supp. 763 at 772, 773 (¶¶37-38), 789 (¶5).

Is the union obligated to undertake a costly strike to enforce a statutory duty of the employer, viz, to open up the higher paid position to members of both sexes? There is no guarantee of success in a strike. It is costly. It defeats the purposes of the *Railway Labor Act,* §2, 45 U.S.C. §152, which mandates that employers and unions make reasonable efforts to reach agreements without interruption of service.

In *Emporium Capwell Co.* v. *Community Org.,* (1974), 420 U.S. 50, 69, the Court emphasized that Title VII rights "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." In *Myers* v. *Gilman Paper Co.* (5th Cir., 1977), 544 F. 2d, 837 at 857, the Court stated:

> "We are reminded that while Title VII expresses an important national policy, it does not exist in a vacuum. Important national policies also emanate from the NLRA. . . ."

Congress has afforded rights and protections to employees in several forms. One establishes a process of union representation and collective bargaining. The other is the enactment of a number of statutes, such as the Fair Labor Standards Act, 29 U.S.C. §201, et seq., the Federal Employers Liability Act, 45 USC §51, et seq., the Occupational Safety and Health Act ("OSHA") 29 U.S.C. §661, et seq., Title VII and others. These establish substantive rights which employees may claim independently of their unions and of the process of collective bargaining. *Alexander* v. *Gardner-Denver Co.,* (1974) 415 U.S. 36. Unions have not been appointed exclusive representatives for the vindication of such direct statutory rights.

> "Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged. The situation is not parallel, and it does not seem to us that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice.
>
> 'The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [Equal Employment Opportunities] Commission.' Air Lines Stewards, etc. Loc. 550 v. American Airlines, Inc., 455 F. 2d 101, 106 (7th Cir., 1972).

> Surely the fact that a labor organization is defined in 42 U.S.C. §2000e and made a potential defendant in unlawful employment practice cases does not, as counsel seems to suggest, indicate an intention on the part of Congress that a collective bargaining representative play a special role in Title VII actions to redress unlawful employment practices by an employer."
>
> *Airline Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, et al* v. *American Airlines,* (7th Cir. 1973) 490 F. 2d 636 at 641-642.

See *Ray Marshall, Secretary of Labor* v. *U.S. Postal Service, et al.* (D.D.C. 1978) 481 F. Supp. 179, aff'd in part, reversed in part, by unpublished judgment of Cir. Ct., D.C., in Appeal No. 79-1783, affirming denial of intervention by the National Association of Letter Carriers in a Fair Labor Standards Act matter. (Copy annexed as Appendix A).

Statutory rights are acts independent of the duty of fair representation, as formulated in *Steele* v. *Louisville & Nashville R.R. Co.,* (1944) 323 U.S. 192. The enforcement of statutory rights is not a part of the union's statutory obligation as exclusive bargaining representative. They are not the subject of the collective bargaining process. *Steele, supra,* does not make them so. *Steele* and its progeny imply a duty in the areas where Congress has vested the union with "exclusive" power both to create and restrict the rights of employees and requires that in exercising that power the unions not be motivated by bad faith and that they act without hostile discrimination.

> "We hold that the language of the Act to which we have referred, read in the light of the purposes of

> the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."
>
> *Steele* v. *Louisville & Nashville R.R. Co., supra,* 323 U.S. 192 at 202-203.
>
> Also see *Ford Motor Co.* v. *Huffman,* (1953) 345 U.S. 330; *Humphrey* v. *Moore,* (1964) 375 U.S. 325; *Vaca* v. *Sipes,* (1967) 386 U.S. 171.

Congress did not intend that parties would bargain about whether employers would discriminate. There is nothing to bargain about. Indeed, the contractual remedy is not well-suited to the final vindication of Title VII rights. *Alexander* v. *Gardner-Denver, supra.*

The purpose of the Railway Labor Act is to maximize industrial peace. To read Title VII or EPA as imposing a requirement that parties negotiate to an impasse toward a solution of discrimination problems increases the risk of strikes, which would work at cross purposes to a basic objective of the Railway Labor Act and the National Labor Relations Act.

Congress assigned the policing function to the EEOC and appropriated monies with which it could carry out its function. The unions do not have a duplicate responsibility which would impose substantial costs on the employees represented by the union, some or all of whom may be the victims of the discriminatory process, as they are in this case.

Union officers must be democratically elected under the LMRDA and responsive to the desires of the membership.

They may not wish to pay dues to enforce Title VII rights. Congress did not intend to force them to do so.

The EEOC has reached the conclusion that a union's good faith effort in negotiations to obtain equal opportunity provisions without the cooperation of the employer evidences a lack of culpability of the union. 31 *Labor Law Journal,* pp. 394-395 (July, 1980). Also see EEOC Decision 70-112, Case No. YAT 9-197, CCH EEOC Decision 1973 ¶6108 p. 4159 (Sept. 5, 1969). (Copy annexed as Appendix B.)

For these reasons, it is not enough to charge the unions with violation of EPA and Title VII by simply alleging, as has NWA, (J.A. p. 18 ¶7) that the labor organizations participated in the negotiation of a labor agreement, particularly when it has been found that the part of it which is invidious is so only because of a discrimination on the basis of sex which arises out of the employer's exclusion of women from a higher paid position, 366 F. Supp. 763, at 789 (¶5 (a)), a condition of employment which the labor organization is not alleged to have negotiated or to which it agreed. *Murphy* v. *Miller Brewing Co.* (D.C., E.D. Wis. 1969) 307 F. Supp. 829, aff'd (7th Cir. 1972) 457 F. 2d 221.

We realize that there are precedents below to the contrary. E.g., in *Myers* v. *Gilman Paper Corp.,* (5th Cir. 1977) 544 F. 2d 837 the Circuit Court refused to accept a similar argument proposed by the United Paperworkers International Union ("UPIU").

> "UPIU contends that given this limited union role, a union has a good defense to back pay liability where it has urged the employer to comply with Title VII and has taken a bargaining position to achieve compliance yet lacks sufficient bargaining power to obtain

employer agreement. This argument is not relevant to the primary issue below—whether a defendant is or has engaged in conduct that discriminates on the basis of race or that perpetuates past discrimination. Rather, the argument is germane as to which defendant should bear primary responsibility for the illegal conduct. The court did not err in holding that UPIU had no "business necessity" defense.

In so ruling, the Fifth Circuit has chosen to ignore the plain language of the statute. "It shall be an unlawful practice for a labor organization to cause or attempt to cause an employer to discriminate . . ." One cannot reasonably say that a union which "has taken a bargaining position to achieve compliance, yet lacks sufficient bargaining power to obtain employer agreement", has *"caused or attempted to cause"* the employer to violate Title VII or EPA. It has no economic choice in such a bargaining process other than to sign an agreement. The blindness of the Court to the language of the statute remains with the Court's treatment of the union's efforts to avoid the discriminatory terms as being only a question as to "which defendant should bear primary responsibility for the illegal conduct".

Another illustration of how the courts go astray in evolving their own concept of invidious discrimination without regard to the plain language of the statute is found in *Burwell, et al.* v. *Eastern Airlines* (E.D. Va. 1978), 458 F. Supp. 474. The District Court in *Burwell* found Eastern's mandatory maternity leave policy to be discriminatory. It also declared that the Union "is guilty of unlawful discrimination" because the Union "acquiesced in the discrimination and never so much as filed a grievance" (*Ibid.*, p. 502). The acquiescence was evidenced by the Union's collective

bargaining agreement which contained the mandatory leave policy. Yet the Court found that:

> ". . . as a practical matter the Union was virtually powerless to alter Eastern's policy. But cf. *Local 194, Retail, Wholesale and Department Store Union* v. *Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976); *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973). The policy was in no real sense the product of negotiation. It was unilaterally imposed by Eastern. The Union acquiesced under protest. As of July 2, 1965, the Union faced a number of discriminatory practices imposed by Eastern with respect to women. Female flight attendants at that time stood to lose their jobs if they married or had a child. The Union, in good faith, began to whittle away at these practices in a logical progression. The vigor with which the Union attacked maternity related issues was undoubtedly limited by the absence of support within its general membership.
>
> The Court is aware that back pay awards serve a dual purpose of compensating victims of discrimination and inducing both employers and unions to voluntarily eliminate illegal employment practices. *Albermarle Paper Co.* v. *Moody, supra,* 422 U.S. at 418, 95 S. Ct. 2362; *Russell* v. *American Tobacco Co., supra,* 528 F.2d at 366; *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226, 231 (4th Cir. 1975).[2] In the instant case, however, the

[2] The cases which base union liability on acquiescence through the signing of labor agreements with a discriminatory effect or impact and assert an affirmative duty on the part of the union to negotiate out such discriminatory effect or impact, never do so on the basis of the language of the statute they are applying. They simply make a judicial interpretation that it would be beneficial to the purposes of Title VII or the EPA to delegate to unions the job of enforcing the Acts. The federal agencies created by Congress for

> Union was more than willing to eliminate the illegal practice. It was Eastern and not the Union which insisted on the policy and refused to alter it. The Union initiated the only bona fide efforts to secure for women flight attendants the right to continue working during pregnancy. Under these circumstances, assessment of back pay awards remain against defendant Eastern only. *Johnson* v. *Ryder Truck Lines, Inc.*, 555 F.2d 1181 (4th Cir. 1977); *Williams* v. *Norfolk and Western Railway Co.*, 530 F.2d 539, 543 (4th Cir. 1975)."
>
> Id. 458 F. Supp. 474 at 503.

On Eastern Airlines, as on NWA, the Union's general membership was overwhelmingly female. The Findings upon which the above Conclusions of Law were based are stated on pp. 489 and 490 of 458 F. Supp. 474. With such findings, a determination that the Union "caused" the carrier to violate Title VII in thus "acquiescing" to the agreement containing the employer's discriminatory policy is incredible. The absence of an assessment of back pay against the Union in *Burwell* and in *Myers* does not make it any less so.

---

enforcing its mandates are not liable for damages to the employees for whose protection of benefits they were appointed, but unions, these Courts say, are liable to them if they fail to carry out their judicially determined responsibilities. See *Macklin* v. *Spector Freight Systems* (D.C. Cir., 1973), 478 F.2d 979, at 989.

II.

If a Duty of Contribution by a Union to an Employer in a Title VII or Equal Pay Act Proceeding Is Recognized by This Court Under Any Circumstances It Can Be Only Upon Equitable Grounds of Which There Are None That Favor NWA in This Proceeding.

A. *NWA Alone Profited From Its Failure to Pay Stewardesses Rates of Pay Equal to Those Paid to Pursers.*

This is not a proceeding, as in *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972, in which the defendants engaged in a combination or conspiracy with the plaintiff and shared or were intended to share in the benefits which were derived from it.

TWU gained nothing by the failure of NWA to pay to its numerous stewardesses the higher salary rates that it paid to its few pursers.[3] TWU also had nothing to gain by NWA's payment of the higher salary rates to the pursers. The benefit inured only to NWA. What in effect is being claimed by NWA is that TWU caused NWA to save millions of dollars by its participation in the negotiation of a labor agreement paying less in salary to the stewardesses than should have been paid to them under the Acts.

NWA might argue that had it not been for the collective bargaining agreement, it would have paid the pursers only the rates of pay afforded to the stewardesses. This contention was not made in its complaint herein because it is wholly untenable. As stated by the U.S. Court of Appeals in *Laffey, supra:*

> ". . . Beyond that, the Union's agreement to negotiated terms is hardly evidence of an individual member's

---

[3] "As of April 25, 1970, NWA employed 137 male cabin attendants, all as pursers, and 1747 cabin attendants, all but one as stewardesses." *Laffey, supra,* 366 F. Supp. 763 at 773, ¶38.

> appraisal of the skills, efforts, and responsibilities essential to performance of the jobs. Particularly is this so where, as here, the union was bound to represent pursers as well as stewardesses, and took on that responsibility at a time when earlier company policy had already created a status quo under which pursers were more highly paid than stewardesses. Since the union's obligation thenceforth was to seek pay raises benefiting all its members, it obviously was not in a position to alter substantially the position of one constituent group at the expense of another. And when the union did attempt to win better treatment for stewardesses, it encountered stiff resistance from NWA. The only logical inference from this combination of circumstances is that as a matter of strategy—not attributable to any belief as to the comparability of the two jobs—the union chose to forego a special demand for equality for the stewardesses in order to achieve more pressing bargaining objectives."
>
> *Laffey* v. *Northwest Airlines, Inc.*, (D.C. Cir. 1976) 567 F.2d 429 at 447.

When NWA purported to attempt an equalization of pay, it proposed, in 1966 and 1967, that cabin attendant salaries be paid to pursers and stewardesses at the lower rate then paid to stewardesses. *Laffey, supra,* 366 F. Supp. 763, at 767-768. (¶23) The Union can hardly be faulted for rejecting this proposal since it flouted the terms of the EPA.

> (d)(1) "No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . : Provided, that an employer who is paying a wage rate differential in

> violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."
>
> 29 U.S.C. § 206(d)(1)

NWA attempted, in *Laffey, supra,* to use the collective bargaining agreement as a cloak for shielding itself against blame for its discriminatory treatment of females in connection with its higher pay rates for pursers. Having failed, it now seeks to compel the Union to pay a part of the wages which it alone was obligated to pay to the stewardesses for services rendered solely on behalf of NWA, at no gain to TWU. NWA seeks a windfall payment from TWU, which, if successful, would tend to encourage employers to include low discriminatory rates of pay in collective bargaining agreements, since, if challenged, it would cost them only what they otherwise would have to pay if they complied with the law, less what the Union would be compelled to pay to them by way of contribution.

B. *NWA Alone Violated the Civil Rights Act by Refusing Employment to Women in the Purser Position.*

> *Laffey, supra,* 366 F. Supp. p. 763, at 778 (¶ 45), 789 (¶ 5(a)).

The complaint makes no allegation that TWU was responsible for NWA's discrimination against females in filling purser positions, nor was it so. A differential in pay between positions, even if their performance requires equal skill, effort and responsibility and are performed under similar working conditions, is not a violation of law. It is a violation of law only if the differential is based on sex (EPA and Title VII), or race (Title VII). The reason Laffey and the others prevailed in their claim of discrimination in the payment of lower rates of pay to the steward-

ess position than were paid to the purser position is because NWA would place only males in that position. Neither TWU nor its agreement with NWA restricted the purser position to males.

C. *NWA Refused to Open the Purser Position to Women or to Remove the Differential Lawfully.*

Laffey findings, 366 F. Supp. 763, et seq., show that NWA always maintained that the purser's position was a more responsible position than was the stewardess position, requiring more training and additional qualifications and, most significant of all, that it could only be filled by a male. NWA has never been so bold as to allege that TWU or ALPA insisted that it hire and employ males only in the purser position and females only in the stewardess or cabin attendant position.

In 1964, by virtue of the enactment of the EPA, NWA and, for the moment, we will assume TWU, were required to examine into this sex oriented distinction, and as concluded by the Court below in 1973, to treat the two positions as being of equal skill and responsibility. To avoid an offense to the Act, therefore, either the positions had to be made available to members of both sexes at the then existing differential in rates of pay, or the differential had to be eliminated.

As appears in the *Laffey* Findings, 366 F. Supp., at 767 (¶¶ 22, 23) and 778 (¶ 45), TWU attempted the former course of making the purser position available to women, since it and NWA believed the differential was still warranted by the duties and responsibilities of the purser and stewardess positions, and a similar differential in pay was maintained elsewhere in the industry with members of both sexes occupying the higher paid purser positions. Furthermore, the females in the NWA operation represented by

TWU, and who dominated ALSSA, TWU on NWA, did not request removal of the differential but requested only that the higher paid position of purser be made available to them despite the circumstance of their sex. Had NWA agreed to TWU's demand in this respect, NWA would not have been liable to its stewardesses for purser pay because the payment of the differential would no longer have been based upon the sex of its occupants.

The Union's representation function as to any member of the bargaining unit begins after he or she is employed. A job applicant is not represented by the Union until he or she has been hired and assigned by management to a job in the bargaining unit which the Union represents.

> *Chemical Workers* v. *Pittsburgh Plate Glass Co.* (1971), 404 U.S. 157, 181, n.20;
>
> *Green, et al.* v. *U.S. Steel Corp., et al.* (E.D., Pa. 1979), 481 F. Supp., 295, at 314.

The qualifications for hiring applicants are therefore not a mandatory issue of bargaining. The Unions were not able to bargain effectively for a provision in the agreement that would require the Company to hire persons of either sex. NWA, and the airline industry, admittedly refused to allow Unions to have any voice in the selection of males or females for cabin attendant positions.

The duty of fair representation thus does not reach the female applicant for the purser position, because of the absence of any right of the Union to represent her. The Union cannot be placed by Title VII under an obligation to bargain with the employer on her behalf to prevent sex discrimination.

The Union did make an effort to prevent discrimination against females on account of sex after they were hired

as cabin attendants by proposing in negotiations that the purser position be available to them in the exercise of seniority, 366 F. Supp. 763, at 767-768 (¶23). The effort was frustrated by NWA's concept of male superiority for the purser position, *Id.*, p. 769 (¶¶26-28, 36-38, 45).

The other avenue available to NWA and TWU for complying with the EPA, and later Title VII, would have been to remove the differential in pay between purser and stewardess. This apparently occurred to NWA in 1966 and it proposed such a recourse but, in doing so, as has heretofore been explained, it was suggesting another offense against the EPA, because it was proposing a reduction in pay to the stewardess level rather than as required by 29 U.S.C. §206(d)(1), an increase to the higher rate of pay. This proposal was not palatable to TWU, not only for the obvious industrial and organizational reasons, but for the legal reasons as well.

NWA, having failed and refused to open the purser position to females in 1965 to comply with Title VII, it was obligated to increase the rates of pay to stewardesses for services rendered to NWA. It is now claiming contribution to that payment by TWU, on equitable grounds, because the agreements made by NWA and TWU adopted neither possible remedy, even though it was NWA which rejected them both.

D. *NWA's Claim for Contribution Is Not Addressed to Any Union Beneficiary of NWA's Violation of Either the EPA or Title VII.*

NWA claims that somehow the Union, TWU, shared in the fruits of NWA's payment of lower wages to its stewardesses than was required by law (NWA brief, p. 36). It is not clear, however, in what respect TWU made or could have made any profit or acquired any benefit as claimed.

TWU is an International Union in the AFL-CIO and represents workers in many industries and establishments who have no relationship to each other as employees. They are organized as local unions. The NWA cabin attendants, male and female, were members of a small flight attendant local union named ALSSA before affiliating with the International TWU. After affiliation, its members continued to have their own officers and treasury and governed themselves, contributing a minor portion of their monthly dues to the International Union, which furnished them with guidance, assistance in bargaining and processing grievances, giving them a voice in the labor movement of the United States through the AFL-CIO, assisting them in their problems with administrative agencies such as the Civil Aeronautics Board, National Mediation Board, Federal Aviation Administration, Labor Department and the like but leaving the negotiation of their agreements with NWA to their negotiators, subject to ratification by their membership alone.

The NWA cabin attendants were overwhelmingly female because NWA would only employ females in the numerous stewardess positions. The females, who are the beneficiaries of the judgment of the Court below, dominated NWA's negotiations by their greater number of members of the negotiation committee, by their votes for proposals to be submitted to management, and by their votes for or against the ratification of their agreements with NWA, 366 F. Supp. at 765-766 (¶18).

TWU did not cause a controlling faction of TWU members to use their power to gain advantage over its minority or female members, as often occurs in cases in which a black minority or females are denied advantageous terms of employment for the benefit of a white majority or males

who dominate the Union.[4] On the contrary, the overwhelming majority of ALSSA, TWU's members employed by NWA were the victims of its discriminatory practice and suffered with a lower rate of pay than was paid to the minority of males. Neither TWU nor its membership gained anything by the inferior treatment afforded to the overwhelmingly female membership of the NWA Local who controlled it.

TWU received dues from the cabin attendants, male and female, in equal amounts and without regard to their rates of pay. It received nothing from NWA. The thousands of other TWU members, in local transit systems, on railroads, in universities, and on other airlines, received nothing from NWA or the NWA cabin attendants. They contributed per capita to the International in the same proportion as did the NWA cabin attendants, receiving the same services from the International Union. The servicing of the relatively small contingent of NWA flight attendants was subsidized by the large local unions which contributed the major portion of funds required by the International Union to render services to all local unions in whatever degree they required such services. No equitable consideration would warrant a contribution from all TWU members to help NWA pay its indebtedness to the female members of TWU who were employed by NWA, who negotiated the discriminatory agreement and who alone will receive the benefit of the judgment against NWA.

NWA's comparison of TWU to a business establishment based upon total annual receipts, NWA brief, pp. 44-45, fn. 31, is a distortion, is contrary to fact, and is completely inconsistent with the non-profit concept which underlies

---

[4] E.g. *Macklin* v. *Spector Freight Systems, Inc., supra,* 478 F.2d 979, at 989.

the status of labor unions under the Railway Labor Act, the Labor-Management Relations Act, and the Labor-Management Reporting and Disclosure Act.[5] All of TWU's income is derived from per capita payments made by its members and most of it is devoted to the servicing of its members in their relationships with their employers. The rest of it is used to service its members at Congress, the Courts, state and federal agencies and the AFL-CIO itself. NWA's claim for contribution from these funds to help meet its obligation to pay its employees for services rendered to NWA in accordance with the law is beyond reason! It bears no comparison to the position of the defendants and claimants for contribution in an anti-trust matter, such as *Westvaco Corp.* v. *Adams Extract Co., supra.*

CONCLUSION

An employer charged with a violation of the Equal Pay Act or Title VII of the Civil Rights Act has no right of contribution from the Union representing his employees simply on the basis of their contractual relationship. On their face, the Acts require affirmative action by the Union to make it culpable for a violation of the Act. The collective bargaining relationship is a special one created by law which mandates the negotiation and execution of labor agreements. They do not constitute the affirmative action upon which a claim of violation of the Acts may be based without inquiry into the positions taken and efforts made by the Union in the negotiation of the agreements. Since the complaint of NWA in this proceeding is based wholly upon the

---

[5] The same Form LM-2 to which NWA's brief refers on p. 44 in describing TWU's total receipts of $8.13 million in the fiscal year 1979 shows that TWU's total cash disbursements for that year was $8,366,173.

participation of the Union respondents in the negotiation of their labor agreements, it fails to state a cause of action for contribution under the Acts or at common law.

The complaint asserts a claim for contribution on the basis of the Findings and Conclusions of Law in *Laffey et al.* v. *NWA,* 366 F. Supp. 763, aff'd in part 567 F.2d 429. The Findings establish that the exclusion of females from the purser position and its higher rate of pay, antedate the labor agreements which cover the purser position and were established by NWA without Union participation. They also show that the Unions attempted to remove the exclusion of women from the purser position but failed because of NWA's opposition. The differential in pay between the purser position and cabin attendant position violates no law and is offensive to EPA and Title VII only because NWA, on its own, restricted the purser position to males. NWA's only attempt to remove the differential failed because it proposed a further violation of the EPA by reducing the pay rate of the purser position to that of the cabin attendant position.

The failure of NWA to cross-claim against the respondent Unions or to join them as party defendants has prejudiced the Unions in asserting their defenses upon the facts if their culpability for NWA's violation of the Acts should be submitted to a trial court. NWA is guilty of laches.

The judgment of the Court of Appeals, affirming the judgment of the District Court dismissing NWA's claim for contribution under the EPA should be affirmed. The judgment of the District Court denying the motions of the Union respondents to dismiss the Title VII claims should be reversed or remanded to the Court of Appeals with direction to reverse the District Court, or in the alternative, the judgment of the Court of Appeals remanding the case to

the District Court in order that the District Court may consider the issue of laches should be affirmed.

Respectfully submitted,

O'Donnell & Schwartz

By Asher W. Schwartz
Attorneys for Respondent Transport Workers Union of America, AFL-CIO
285 Madison Avenue
New York, N.Y. 10017
212-532-8900

Of Counsel:

Asher W. Schwartz

October 25, 1980

APPENDIX

APPENDIX A

Unpublished judgment of Cir. Ct., D.C., in Appeal No. 79-1783.

Not to be published—see Local Rule 8 (f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

September Term, 1979

Civil Action No. 78-0602

No. 79-1741

RAY MARSHALL, Secretary of Labor,

v.

UNITED STATES POSTAL SERVICE
MARION CHASTAIN *et al.* and MOZART G. RATNER,

Appellants

No. 79-1759

RAY MARSHALL, Secretary of Labor

v.

UNITED STATES POSTAL SERVICE
EMANUAL T. EVANS, *et al.*,

Appellants

Appendix A

No. 79-1783

RAY MARSHALL, Secretary of Labor

v.

UNITED STATES POSTAL SERVICE
NATIONAL ASSOCIATION OF LETTER CARRIERS, *et al.*,

Appellants

Appeals from the United States District Court
for the District of Columbia.

Before:

WRIGHT, *Chief Judge,* MACKINNON, *Circuit Judge,*
and GASCH,* *District Judge.*

JUDGMENT

These causes came on to be heard on the record on appeals from the United States District Court for the District of Columbia and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

The disposition of this litigation has been delayed by procedural problems in the District Court involving attempts by three groups of applicants, appellants in these cases, to intervene in an action brought by the Secretary of Labor. In our view, Section 16(c) of the Fair Labor Standards Act, 29 U.S.C. § 216(c) (1976), does not, in terms,

---

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

prohibit employees from intervening in an action brought on their behalf by the Secretary.

On consideration of the special facts of these cases, particularly the position of the Secretary that, with the exception of the National Association of Letter Carriers, intervention should be permitted.

It is ORDERED and ADJUDGED by this court that the judgment of the District Court denying intervention is hereby vacated except with respect to the National Association of Letter Carriers, which part of the District Court judgment is hereby affirmed.

It is FURTHER ORDERED that appellants Marion Chastain *et al.* and Mozart G. Ratner, Emanual T. Evans *et al.*, and Angel L. Correa, Robert W. Dunn, and Wilburn Taylor, Sr. be permitted to intervene in *Marshall* v. *United States Postal Service,* Civil Action No. 78-0602. The intervention of appellants Chastain *et al.* and Ratner shall be solely for the purpose of raising the question concerning the alleged existence of the so-called "non-plaintiff agreement." Inasmuch as a finding by the District Court that such an agreement exists and is enforceable may pretermit some of the issues raised in the Secretary's action, the interests of efficiency and conserving judicial resources suggest that the District Court should proceed expeditiously to resolve this issue before proceeding with trial of the Secretary's action.

Except for the issue concerning the alleged existence of the "non-plaintiff agreement," the intervention of appellants Evans *et al.* and Correa, Dunn, and Taylor "is limited to the claims of illegality presented by the Secretary's complaint." *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 537 (1972). The District Court may place such other ap-

propriate restrictions on their intervention as may be necessary for the efficient conduct of this complex litigation.

Per Curiam

For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

A true copy:

Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ (Illegible), *Deputy Clerk*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JUN 04 1980
GEORGE A. FISHER, *Clerk*

FILED JUN 27 1980
JAMES F. DAVEY, *Clerk*

APPENDIX B

EEOC Decision 70-112, Case No. YAT 9-197, CCH. EEOC Decision 1973, ¶ 6108, P. 4159.

[¶ 6108]

WAGE SCHEDULE ARRANGEMENT DISCRIMINATES ON BASIS OF SEX

Decision of Equal Employment Opportunity Commission, Decision No. 70-112, Case No. YAT9-197, September 5, 1969.

Title VII—Civil Rights Act of 1964

Employer—Sex Discrimination—Segregated Job Classifications—Wage Schedule Arrangement—Prevailing Community Wage Plan.—Reasonable cause existed to believe that an employer discriminated against female employees because of their sex by rating their jobs at a lower wage schedule than male jobs. Evidence showed that the employer, under its union contract, divided its employees into two groups. One group consisted of traditionally all-female classifications and the other group consisted of traditionally all-male job classifications. Different wage classifications were assigned to each job category allegedly pursuant to a community wage system. A contention by the employer that different wage rates for men and women were justified under the prevailing community wage system, which operated under a theory of labor supply within a community, did not excuse the resulting sex bias, since the system as followed by the employer operated to favor male employees by granting them higher wages than females. The employer failed to show that local labor market conditions, rather than sex bias, were the basis for the different wage schedules for each job.

Union Sex Discrimination—Collective Bargaining Contract Sanctioning Discriminatory Job Classifications and

Appendix B

Wage Schedules—Opposition to Unlawful Clauses.—Reasonable cause did not exist to believe that a union committed sex discrimination with respect to female employees by reason of unlawful discriminatory clauses in a contract with their employer, in view of the union's opposition to the clauses and its proposed non-discriminatory substitutes which were rejected by the employer.

FACTS

Charging parties allege that employer and union local jointly and severally have committed and are committing unlawful employment practices by discriminating against charging parties with respect to compensation because of their sex.

Charging parties are female employees of employer who are within the bargaining unit as defined in the collective bargaining agreement. Charging parties individually allege that employer and union incorporate in their collective bargaining agreement a wage rate based on a "prevailing community wage" principle which discriminates against them because of their sex. Respondents deny the charge.

Employer alleges that local variations in wage schedules are based solely upon local variations in supply and demand for the various services and skills required by Respondent.

For wage purposes the collective bargaining agreement divides employer's 116 job classifications into two groups. One group is entitled Appendix A, and includes what employer describes as "clerical and related" jobs. The second group is entitled Appendix B, and includes what employer describes as "craft and related" jobs. The Commission notes that Appendix A jobs are traditionally all-female classifications, while Appendix B jobs are traditionally all-male.

Appendix B

Charging parties' complaint does not allege disparity in the base wages assigned to Appendix A jobs; rather, the complaint alleges disparity in the schedule adjustments made for Appendix A jobs vis-a-vis Appendix B jobs.

Under the collective bargaining agreement, one of four schedules is attached to each of the 731 facilities, depending primarily on employer's assessment of the local supply of skills and services needed by the respective facilities and, to a lesser extent, upon a cost-of living factor. Schedule 1 is to be assigned to facilities where demand for telecommunication skills is highest and Schedule 4 is to be assigned where demand for such skills is lowest. The situation now existing in many of the 731 facilities is that one wage schedule is applied to Appendix A jobs and another to Appendix B jobs. Such is the case at the facility where Appendix A jobs (which include charging parties' positions) are on Wage Schedule 3 and Appnedix B jobs receive Wage Schedule 2. Charging parties allege this disparity is because of their sex.

In many exchanges, only jobs from one Appendix exist, but in 463 towns both men and women are employed. In 216 of these towns, or 46.8 percent, the same wage schedule is applied to both Appendices. In 243 of these towns, or 52.6 percent, a wage schedule one or two steps lower is applied to Appendix A or female jobs. In 3 towns, a wage schedule one step lower is applied to Appendix B, or male jobs. At Employer's facility, Appendix A jobs are entirely female and Appendix B jobs are entirely male.

Employer sums up its position as follows:

> Since labor market conditions and other factors relevant to wage determination are not necessarily the same in any particular locality for clerical workers as for plant craft workers, it goes without saying that the

> same town may well be in a relatively higher schedule for craft wage purposes than for clerical wages. This is exactly what sometimes happens and it is true in the . . . town(s) represented by the charge(s).

FROM TEXT OF EEOC DECISION

In a recent Commission Decision (AT-6-0-636 et al., April 21, 1969) involving this same employer and the same wage plan and collective bargaining agreement, we found that Respondent's wage schedule arrangement discriminates on the basis of sex in violation of Section 703(a)(1) of Title VII.

We make the same decision here as to the charges against Respondent Employer, for the reasons articulated in the above-cited Commission Decision.

In that Decision we stated as follows:

> While Respondent characterizes the Appendix A jobs as "clerical" and the Appendix B jobs as "craft," it is clear that some of the Appendix A jobs, e.g., janitress, are not clerical and some of the Appendix B jobs, e.g., janitor, are not craft. What is equally clear is that all of the Appendix A jobs are traditionally all-female classifications while all of the Appendix B jobs are traditionally all-male classifications.[2] Therefore Respondent's argument reduces to the contention that "the same town may well be in a relatively higher schedule for [male] wage purposes than for [female]

---

[2] With respect to these "male jobs," where the issue has arisen, the Commission and the Courts have rejected [*] contention that sex is a bona fide occupational qualification therefor. See, e. g., *Weeks* v. *Southern Bell Telephone and Telegraph Company,* [59 LC ¶ 9213] 408 F. 2d 228 (C. A. 5, 1969).

* Identifying detail deleted in official text.—CCH.

wages." In short, without regard to nature of the work, Respondent has assigned jobs to Appendix A or to Appendix B because of the sex of the persons traditionally performing these jobs. We believe that such assignment and grouping because of sex, under the circumstances here, constitutes unlawful segregation because of sex in violation of Section 703(a)(2) of Title VII.

In addition, since such assignment and grouping in most cases results in relatively lower wages for the Charging Parties and for females as a class, these practices also violate Section 703(a)(1).

Where, as here, a "prevailing community wage" adjustment system frequently operates to favor male employees, but virtually never operates to favor female employees, it is incumbent upon an employer to come forward with convincing evidence to show that, in fact, local labor market conditions rather than sex discrimination are the basis (sic) for the different wage schedules for each job. Here there is no such evidence. Surely the Commission cannot be expected to accept, without any supporting data, that, in over half of Respondent's exchanges employing females, all "male" jobs, including Janitors and Assignment Men, are more difficult to fill than all "female" jobs, including Janitress and Assignment Clerks.

Accordingly, we conclude that reasonable cause exists to believe that Respondent discriminates against Charging Parties and similarly situated females because of their sex, by rating their jobs at a lower schedule than male jobs, in violation of Section 703(a) of Title VII.

Appendix B

[*Charges Against Union*]

As to the charge against Respondent Union, Respondent Union contends that since 1945 it has consistently opposed the Company's "community wage" theory. Respondent Union cites, as an example, a proposal offered by it during contract negotiations in April, 1968, to place all towns on the same wage schedule for all Company departments. This proposal was rejected by Respondent Employer.

In light of the documentary evidence in the record that Respondent Union did actively oppose the inclusion of the unlawful features of the wage plan, we conclude that Respondent Union has not committed an unlawful employment practice within the meaning of Section 703(c) of Title VII.